Supreme Court, U.S.
FILED

(1)

NO. 98 458 SEP 11 1998

OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1998

JON HAROLD ROYAL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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22 pp

## QUESTIONS PRESENTED

1. Was Petitioner denied effective counsel in violation of the Sixth Amendment to the Constitution of the United States?

2. Was the denial of Petitioner's right to effective counsel, required by the Sixth Amendment to the Constitution of the United States, a producing cause of the present restraint of his liberty?

3. Should the benefits of the plea bargain offered Petitioner, of which he was deprived by the violation of his right to effective counsel, be restored to him by this Honorable court ordering specific performance of said offered plea bargain and ordering discharge of Petitioner from the judgment and sentence under which he is presently restrained?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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JON HAROLD ROYAL,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

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The Petitioner, JON HAROLD ROYAL, prays that writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on June 16, 1998.

## OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U.S. v. Royal*, yet unreported, appears at Appendix A and the order of said Court denying rehearing appears at Appendix B.

## JURISDICTION

The judgment and opinion of the United States Court of Appeals, Fifth Circuit, (Appendix A) was rendered on June 16, 1998. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 23 U. S. C A. 1254 (1).

## CONSTITUTION PROVISIONS, STATUTES AMD RULES INVOLVED

***Constitution of the United States, Amendment VI:***

> "In all criminal prosecutions, the accused shall enjoy the right. . ., and to have the Assistance of Counsel for his defense."

***28 § 1254 (1):***

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

## STATEMENT OF FACTS

Petitioner was convicted and sentenced in this cause for the offense of conspiracy to possess with intent to distribute cocaine, which judgment was affirmed by the Court of Appeals on September 8, 1992. On June 3, 1996, a motion to vacate the judgment and sentence herein, under 28 U.S.C. § 2255, was filed by Petitioner in the United States District Court wherein said judgment and sentence were rendered.

After an evidentiary hearing, the *United States District Court found that Petitioner herein was denied effective counsel* in violation of the Sixth Amendment to the Constitution of the United States, but, *nevertheless, denied Petitioner any relief.* Notice of Appeal was duly filed on October 15, 1997 by Petitioner and the United States District Court duly granted a Certificate of Appealability upon the ground that Petitioner had made a substantial showing of the denial of a constitutional right by reason of ineffective counsel.

The Trial Court made the following findings of fact:

"Petitioner was charged by indictment with distribution of cocaine. He retained Flood and paid him approximately $28,000.00.

On a Tuesday afternoon in January, 1991, Petitioner called Flood to inquire about his pending case. Petitioner was, as a condition of release required to reside at the Salvation Army halfway house, but could leave from 7:00 a. m. to 6:00 p.m. in order to work. Flood, in Houston, advised Petitioner for the first time that the Government had offered a plea agreement. The offer was made approximately 30 days previously and was to expire at 5:00 p.m. that day. The offer was that if Petitioner would truthfully debrief and cooperate, he would be allowed to plead to a lesser offense that would result in a Guideline Range of 15-18 months.

When petitioner did not immediately decline the offer, Flood advised him that he had a policy to never represent 'government whores' or 'snitches'. Petitioner told him he wanted to talk to him face to face. Flood said he would call the pre-trial officer and request permission for Petitioner to come to Houston and also get the plea agreement deadline extended. Flood did get the extension, but permission for Petitioner to travel to Houston was denied. Had Petitioner decid-

ed he did want to debrief, the Government would have allowed him to do that, then *if* he debriefed truthfully, enter into a formal plea agreement." (R. Vol. II, P. 339-340)

"In this case, a conflict of interest also exists. Flood's reason for not representing 'snitches' is obvious. By making that policy known, he becomes an attractive attorney for drug dealers whose underlings have been caught. They can retain Flood without fear of being turned on by their associates. Also, Flood can charge more since most of his clients would go to trial. Thus, Flood has built into his practice a conflict between his client's best interest and his own earning potential ..... it is thus unfortuante that Petitioner was so unethically and ineffectively served by counsel."
(R. Vol. II, P. 341)

The above findings are clearly supported by the undisputed testimony of Petitioner's attorney Chris Flood at the evidentiary hearing ( Evid. Hearing, P. 22-36) When Royal finally found out about the offer he wanted to take same, but Flood told him he would be a whore for the Government and a snitch and that he would not represent him, (Evid. Hearing, P. 8) and he did not have enough money to hire another competent attorney since he had already paid Flood close to $28,000.00 and owed more. (Evid. Hearing, P. 5, 10, 47)

Despite the above findings of the Court and said undisputed facts the *District Court arrived at the legal conclusions that* nothing would be accomplished by affording the Defendant a new trial since he had later debriefed, that there was no contract upon which to order specific performance

because Petitioner did not debrief prior to trial, that at this time the Government can receive nothing of benefit in exchange for a lesser plea and that *"it is thus unfortuante that Petitioner was so unethically and ineffectively served by counsel."* (R. Vol. II, P. 343)

The undisputed evidence showed that Petitioner was confronted with the fact that his former friend and co-conspirator was testifying as an eye witness to his guilt of every element of the alleged offense and with a potential *maximum sentence of life,* that after trial *he was sentenced to 30 years confinement, that he had been advised by Flood that the maximum statutory sentence was 20 years,* (Evid. Hearing, P. 26), that Petitioner called his attorney Flood long prior to said trial to inquire about his case, that at that time said Flood, *for the first time,* advised Petitioner that the Government had made a plea bargain offer *30 days previously that would expire* at 5:00 p.m. *that very day,* that under said plea bargain in return for Petitioner's plea and cooperation he would be allowed to plead to a lesser offense that would result in a guideline range from 15-18 months confinement, that when Flood told him of said plea bargain offer, Petitoner said to himself "It is over, that's too good to pass up", (Evid. Hearing, P. 8), that Petitioner told Flood that he had already done two months in the county jail, that he might get some months off for his halfway house time, and would only have to do less than 12 months, (Evid. Hearing, P. 6, 24), that Flood then stated "If you want to be a whore for the Government, we can't represent you. Our firm doesn't represent snitches", that in response to said statement by Flood Petitioner asked could he come down and talk to Flood about it, that Flood stated he would seek to get permission for him to do so, that Flood did not obtain such permission, but did get the plea

agreement deadline *extended until noon the next day,* (Evid. Hearing, P. 6-8, 24-26), that Petitioner did not have enough money to rehire another lawyer and feared to proceed without one, (Evid. Hearing, P. 10), that at the time of said plea bargain offer Royal had not paid all of Flood's fee, and that Flood drove to Waco and collected the balance of his fee just before trial. (Evid. Hearing, P. 47)

As found by the Trial Court, the above facts clearly show that "Flood has built into his practice a conflict between his client's best interest and his own earning potential." Flood had a further conflict of interest by reason of the fact that if the Defendant took this *unquestionably wonderful plea bargain* it would be unlikely that Flood would collect the remainder of his fee. Thereafter, immediately prior to trial Flood drove to Waco and collected the balance of his fee from a friend of Royal. The Court's legal conclusions that "it is thus unfortuante that Petitioner was so unethically and ineffectively served by counsel, but, since the offer was not accepted by Petitioner there was no contract to order specifically performed and *the Government can receive nothing of benefit now in exchange for the plea bargain, are directly contrary* to sound decisions which hold that the promise of the Sixth Amendment right to effective counsel should be fulfilled by placing a Defendant in the position he would most likely have been had his counsel measured up to that which is constitutionally required.

By the Trial Court's findings of fact, under the undisputed evidence, and as a matter of law, Petitoner was denied effective counsel because his counsel placed his own financial interest above the best interesst of Petitioner when he not only failed to affirmatively advise Petitioner to

accept the offer of a plea bargain that no competent attorney could fail to recommend, but instead, concealed said offer from Petitioner for 32 days up until the next day prior to its expiration and, then, threatened him with withdrawal as counsel if he accepted same.

Each of counsel's deficiencies set out above, *standing alone*, clearly constitute ineffective counsel, and considered cumulatively, they make a mockery of the Sixth Amendment's guarantee of effective counsel.

## REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of other United States Court of Appeals on the same matter, as shown by the following:

The leading decisions as to the remedy for improper deprivation of the benefits of a plea bargain hold that the judgment of conviction should be vacated and *the plea offer reinstated* to permit the Petitioner to receive the benefit he would have received had the promise of the Sixth Amendment been fulfilled. *Boria v. Keane,* 99 F.3d 499 (2), *U. S. v. Blaylock,* 20 F.3d 1458 (9), 1468-69. *Alvernaz v. Ratelle,* 831 Fed. Supp. 790, 799, *Turner v. State of Tennessee,* 940 F.2d 1000, 1002 (6).

The fairly recent case of *Boria v. Keane,* supra, is precisely in point although the degree of ineffectiveness was slight compared to this case. Said decision answers and nullifies every contention made by the Government and Court of Appeals opinion in this case. Said decision states the appropriate remedy as follows:

"Greenwald made clear that he had not in any way or at any time discussed with Petitioner the advisability of accepting or rejecting the offered plea.

. . . . .

(5,6] More importantly, the *Strickland* Court did not intend its 'strong presumption' to apply to a case such as this. It made clear that the purpose of the presumption was to protect lawyers from having strategic decisions judged with 'the distorting effects of hindsight.' 466 U.S. at 689, 104 S.Ct. at 2065. Greenwald was confronted with no strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision of whether or not to accept the plea bargain. In no event could Greenwald have been relieved of his constitutional duty to give his 'professional advice on this crucial decision.' . . . . . the trial judge suggested that the remedy petitioner sought, namely to be put back in a position of being able to plead to the lesser indictment, was procedurally impossible. Whether or not such relief would then have been possible, it would not now be appropriate. There could now be no assurance that witnesses necessary for prosecution would be available should a trial be required. Furthermore, there is no claim before us on this appeal that the trial was affected by constitutional (or indeed any) error. Accordingly, petitioner having already served six years in prison—at least twice as long as would have been possible had he accepted the offered plea bargain—

we shall order that the sentence be reduced to time served and that the petitioner be discharged, but the judgment of conviction will not be disturbed."

The only theories advanced by the Government, the Trial Court, or the Summary Panel opinion in support of denial of the relief sought are (1) that Royal might not have cooperated with the Government even had he formally accepted said offer and (2) an agent, without stating any fact allegedly stated by Royal, gave the conclusionary statement that, after Royal had been sentenced to 30 years, she conferred with him to determine whether the Government might file a Rule 35 motion and she *concluded* that he did not tell her the truth. No facts were stated to support this *naked conclusion* of this would-be human lie detector. As to the first contention above, suffice it to say that in 49 years of Federal practice and the making of many plea bargains, I have never known any Defendant to ever have a plea bargain withdrawn because of the Defendant's failure to cooperate as agreed upon. This is so because *every competent attorney,* when a favorable plea bargain is made, carefully, strongly, *and repeatedly* advises the client that nothing he says can possibly harm him so he should answer every question asked by the Government's attorneys and agents correctly and truthfully and cooperate in every respect. Actually, a fair estimate would be that more than 99% of all plea bargains agreed upon are carried through without any revocation by the Government. This contention is more frivolous than the contention that the Defendant might have had a nervous break-down during debriefing and been mentally and physically unable to answer any question and cooperate. The second contention is equally without merit for the reasons that the mere conclusion of the agent that in her opinion Royal did not tell all of the truth is a mere conclusion without probative

value and the issue of *whether the Government should file a Rule 35 motion* is *whether* a Defendant has *subsequently rendered "substantial assistance"' in the investigation or prosecution of another person who has committed an offense".* "Substantial assistance" is *not required for a plea bargain,* merely true debriefing. The above two contentions of the Government readily reveal the absolute dearth of any justification for not making the promise of the Sixth Amendment a reality in accordance with the decisions heretofore cited to the Court by Royal.

## CONCLUSION

Either the Sixth Amendment's guarantee of effective counsel means something or it means nothing. The deprivation of said right has resulted in Petitioner's loss of liberty for fifteen years beyond what it would have been had said guarantee been fulfilled. This is an unconstitutional wrong that cannot be totally remedied, but this Honorable court can to a limited extent do so.

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and Petitioner accordingly so prays.

Respectfully submitted:

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/s/ Wm. Dunnam, Jr.

State Bar No. 06262000
ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Seth Waxman, U. S. Department of Justice, Room 2720, Washington, D.C. 20530, this 9th day of September, 1998.

/s/ Wm. Dunnam, Jr.

M. W. DUNNAM, JR.

# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUT

No. 97-50908
Summary Calendar

FILED
JUN 16 1998

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JON HAROLD ROYAL,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-96-CV-221)

Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Jon Harold Royal, federal prisoner #26464079, appeals the district court's denial of his 28 U.S.C. § 2255 motion. In the motion, Royal contends he received ineffective assistance of counsel because his attorney (1) did not timely inform him of the Government's plea agreement offer and stated that he would not represent Royal if Royal cooperated with the Government and (2) because his attorney failed to object to the admission of, and request limiting instructions for, evidence of Royal's loansharking and prior drug activities.

In reviewing the decisions made by the district court on a 28 U.S.C. § 2255 motion, we review findings of fact for clear error and questions of law *de novo*. *United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994). Ineffective assistance of counsel claims raise mixed questions of law and fact and are reviewed *de novo*. *Id.*

A claim of ineffective assistance of counsel requires a petitioner to demonstrate by a preponderance of the evidence that his or her attorney's performance was deficient and that the deficient performance prejudiced his or her defense and led to a trial whose result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984); *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992). After a careful review of the arguments and controlling authorities, we hold that Royal has failed to carry his burden of proving that he would have been able to satisfy the condition of the plea offer made by the Government. Therefore, Royal has not established that his attorney's performance prejudiced his defense.

The material that Royal contends that his attorney should have objected to was admissible. Royal's attorney was not ineffective for failing to object to such evidence. *See*

*Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). The district court instructed the jury that the evidence of Royal's other criminal activities could not be considered proof that he committed the crime for which he was on trial. Therefore Royal's contention that his attorney should have objected to the trial court's failure to give a limiting instruction is without merit. *See Koch*, 907 F.2d at 527.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

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600 CAMP STREET
NEW ORLEANS, LA 70130

June 16, 1998

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 97-50908 USA v. Royal
USDC No. W-96-CV-221
W-90-CR-104-ALL

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Enclosed is a copy of the court's decision, and judgment has been entered under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P.'s 39 through 41, and 5TH CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **New 5TH CIR. RULES 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated.** Please read carefully the Internal Operating

Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if a nonmeritorious suggestion for en banc is made.

*Direct Criminal Appeals.* 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme Court. Otherwise, the motion may be denied and the mandate issued immediately.

*Pro Se Cases.* If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Yolanda Jeff

Yolanda Jett, Deputy Clerk

Enclosure
Mr Richard L Durbin Jr
Mr William V. Dunnam Jr

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUT

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No. 97-50908

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**FILED**
**AUG 28 1998**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON HAROLD ROYAL,

Defendant-Appellant.

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Appeal from the United States District Court for the Western District of Texas, Waco

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*ON SUGGESTION FOR REHEARING EN BANC*

(Opinion 6/16/98, 5 Cir., _____, _____ F.3d _____)

Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D Johnson 8-20-98

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6